

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re Scotts EZ Seed Litigation

Civil Action No. 12-CV-4727 (VB)

**DECLARATION OF JOSEPH I. MARCHESE IN SUPPORT OF PLAINTIFFS'  
MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS  
REPRESENTATIVES, AND APPOINTMENT OF CLASS COUNSEL**

I, Joseph I. Marchese, declare as follows:

1. I am an attorney at law licensed to practice in the State of New York. I am a member of the bar of this Court, and I am a partner at Bursor & Fisher, P.A., counsel of record for Plaintiffs Michael Arcuri, David A. Browne, Gwen Eskinazi, Stacy D. Lonardo, Lance Moore, Vance Smith, and Nancy Thomas (collectively, "Plaintiffs"). I make this declaration in support of Plaintiffs' Motion For Class Certification, Appointment Of Class Representatives, And Appointment Of Class Counsel. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. Attached hereto as Exhibit A is a true and correct copy of the Grass Seed 2009 presentation bearing Bates numbers SMG-EZ020805-20.

3. Attached hereto as Exhibit B are true and correct copies of excerpts from the 7/29/13 trial transcript in *The Scotts Company LLC v. Pennington Seed, Inc.*, No. 12-cv-00168 (E.D. Va. Mar. 2, 2012).

4. Attached hereto as Exhibit C are true and correct copies of excerpts from the transcript of the deposition of Plaintiff Michael Arcuri.

5. Attached hereto as Exhibit D are true and correct copies of excerpts from the transcript of the deposition of Plaintiff David Browne.
6. Attached hereto as Exhibit E are true and correct copies of excerpts from the transcript of the deposition of Plaintiff Gwen Eskinazi.
7. Attached hereto as Exhibit F are true and correct copies of excerpts from the transcript of the deposition of Plaintiff Stacy Lonardo.
8. Attached hereto as Exhibit G are true and correct copies of excerpts from the transcript of the deposition of Plaintiff Lance Moore.
9. Attached hereto as Exhibit H are true and correct copies of excerpts from the transcript of the deposition of Plaintiff Vance Smith.
10. Attached hereto as Exhibit I are true and correct copies of excerpts from the transcript of the deposition of Plaintiff Nancy Thomas.
11. Attached hereto as Exhibit J are true and correct copies of label exemplars bearing Bates numbers SMG-EZ034706-09 and SMG-EZ034734-35.
12. Attached hereto as Exhibit K are true and correct copies of a 3/21/10 email with an attachment called "Corporate POV – Phosphorus and Water Quality" bearing Bates numbers SMG-EZ004612-16.
13. Attached hereto as Exhibit L are true and correct copies of excerpts from the transcript of the deposition of Eric Nelson.
14. Attached hereto as Exhibit M are true and correct copies of excerpts from the transcript of the deposition of John Sass.
15. Attached hereto as Exhibit N is a true and correct copy of a 6/11/08 email from Eric Nelson bearing Bates numbers SMG-EZ014834-35.

16. Attached hereto as Exhibit O is a true and correct copy of a 11/25/08 email from Eric Nelson bearing Bates numbers SMG-EZ000382-83.

17. Attached hereto as Exhibit P is a true and correct copy of a 10/2/09 email to John Sass bearing Bates number SMG-EZ095831.

18. Attached hereto as Exhibit Q is a true and correct copy of a 10/13/09 email to John Sass bearing Bates numbers SMG-EZ001696-98.

19. Attached hereto as Exhibit R is a true and correct copy of a 11/17/09 email from Mike Faust bearing Bates number SMG-EZ001727.

20. Attached hereto as Exhibit S is a true and correct copy of a 3/17/10 email from Mike Faust bearing Bates numbers SMG-EZ017711-12.

21. Attached hereto as Exhibit T is a true and correct copy of a 6/10/11 email to John Sass bearing Bates numbers SMG-EZ097706-07.

22. Attached hereto as Exhibit U are true and correct copies of a 9/24/09 email to John Sass with an attached EZ Seed Ethnographic Research Summary bearing Bates numbers SMG-EZ097283-85.

23. Attached hereto as Exhibit V are true and correct copies of a 5/12/11 email to Eric Nelson with an attached test Scotts ran at its facility in Gervas, Oregon bearing Bates numbers SMG-EZ034180-82.

24. Attached hereto as Exhibit W is a true and correct copy of a 10/7/09 email to Eric Nelson bearing Bates number SMG-EZ000920-46.

25. Attached hereto as Exhibit X is a true and correct copy of a study by Kenneth Hignight of NexGen Turf Research, LLC entitled *Validation Of The 1 Step Complete Claim "80% Thicker With Half The Water Than Ordinary Seed."*

26. Attached hereto as Exhibit Y are true and correct copies of excerpts from the 7/31/13 trial transcript in *The Scotts Company LLC v. Pennington Seed, Inc.*, No. 12-cv-00168 (E.D. Va. Mar. 2, 2012).

27. Attached hereto as Exhibit Z is a true and correct copy of The Scotts Miracle-Gro Company And The Scotts Company LLC's Response To Second Set Of Interrogatories.

28. Attached hereto as Exhibit AA are true and correct copies of an 8/4/10 email to John Sass with an attached 2011 Pricing: US Consumer Review Consumer Grass Seed bearing Bates numbers SMG-EZ009015-19.

29. Attached hereto as Exhibit BB are true and correct copies of a 2/8/10 email to John Sass with an attached EZ Seed Complaints 2009 bearing Bates numbers SMG-EZ097385-86.

30. Attached hereto as Exhibit CC are true and correct copies of a 10/7/10 email with attached statistics concerning EZ Seed complaints bearing Bates numbers SMG-EZ013954-56.

31. Attached hereto as Exhibit DD is a true and correct copy of a 4/12/11 email to John Sass bearing Bates numbers SMG-EZ09702-04.

32. Attached hereto as Exhibit EE are true and correct copies of EZ Seed Consumer Complaints bearing Bates numbers SMG-EZ014467-78.

33. Attached hereto as Exhibit FF are true and correct copies of sales data bearing Bates number SMG-EZ131678.

34. Attached hereto as Exhibit GG is a true and correct copy of The Scotts Miracle-Gro Company, Inc.'s And The Scotts Company LLC's Supplemental Response To Plaintiffs' First Set of Interrogatories.

35. Attached hereto as Exhibit HH is a true and correct copy of the firm resume of Bursor & Fisher, P.A.

36. Attached hereto as Exhibit II is a true and correct copy of Judge Gardephe's Order appointing Bursor & Fisher and Faruqi & Faruqi as interim class counsel in *Rodriguez v.*

*CitiMortgage, Inc.*, No. 11-cv-04718 (S.D.N.Y. July 8, 2011).

37. Attached hereto as Exhibit JJ are true and correct copies of excerpts from the Scotts Miracle-Gro Company Regional Satisfaction & Product Usage Study bearing Bates numbers SMG-EZ101238-78.

38. Attached hereto as Exhibit KK is a true and correct copy of a 9/24/11 email to John Sass with an attached Consumer Satisfaction Research study bearing Bates numbers SMG-EZ017453-61.

39. Attached hereto as Exhibit LL is a true and correct copy of a 2011 Consumer Satisfaction Research study bearing Bates numbers SMG-EZ017453-61.

40. Attached hereto as Exhibit MM are true and correct copies of sales data bearing Bates number SMG-EZ131681.

41. Attached hereto as Exhibit NN are true and correct copies of excerpts from the transcript of the deposition of Lisa Taubler.

42. Attached hereto as Exhibit OO is a true and correct copy of a letter from an EZ Seed purchaser who requested, but was denied, a refund pursuant to the No Quibble Guarantee.

43. Class certification is routinely granted in consumer class action cases even where class members are unlikely to keep receipts. Attached as Exhibit PP is a true and correct list of 35 such cases, of which 24 were certified on contested motions and 11 were certified for settlement purpose.

44. Attached hereto as Exhibit QQ is a true and correct copy of Lowe's Home Centers, LLC's First Amended Objections And Responses To Plaintiffs' First Set Of Requests For Admission.

45. Attached hereto as Exhibit RR is a true and correct copy of Judge Rakoff's Order approving plaintiffs' proposed notice plan in *Ebin v. Kangadis Food Inc.*, No. 13-cv-02311 (S.D.N.Y. Apr. 8, 2013). This notice plan directed the issuance of subpoenas to "41 retailers and distributors" seeking the production of class member identifying information, which was utilized to provide individual notice to nearly 200,000 olive oil purchasers identified from records subpoenaed from retailers' loyalty card programs.

46. Attached hereto as Exhibit SS is a true and correct copy of an 8/23/07 email to Eric Nelson bearing Bates numbers SMG-EZ005275-77.

47. Attached hereto as Exhibit TT are true and correct copies of statistics concerning consumer complaints bearing Bates number SMG-EZ131299.

48. Attached hereto as Exhibit UU are true and correct copies of Home Depot retail sales data bearing Bates number HOME DEPOT\_EZ SEED\_000001.

49. Attached hereto as Exhibit VV are true and correct copies of Home Depot retail sales data bearing Bates number HOME DEPOT\_EZ SEED\_000002.

50. Attached hereto as Exhibit WW are true and correct copies of Home Depot retail sales data bearing Bates number HOME DEPOT\_EZ SEED\_000003.

51. Attached hereto as Exhibit XX are true and correct copies of Lowe's retail sales data bearing Bates number LHC-EZ000001.

52. Attached hereto as Exhibit YY are true and correct copies of Lowe's retail sales data bearing Bates number LHC-EZ000002.

53. Attached hereto as Exhibit ZZ are true and correct copies of Sam's Club retail sales data bearing Bates numbers WM2014-000464C000001-183.

54. Attached hereto as Exhibit AAA is a true and correct copy of the firm resume of Faruqi & Faruqi, LLP.

55. Attached hereto as Exhibit BBB are true and correct copies of EZ Seed's new Directions For Use.

56. Faruqi & Faruqi, LLP is qualified to serve as class counsel. Faruqi & Faruqi is a national law firm with more than 29 attorneys in offices in New York, California, Delaware, and Pennsylvania. The firm focuses on complex and class action litigation involving antitrust, consumer, financial, corporate governance, and securities matters.

57. Bursor & Fisher and Faruqi & Faruqi were appointed co-lead class counsel in *Rodriguez v. CitiMortgage, Inc.*, No. 11-cv-04718 (S.D.N.Y. July 8, 2011), to represent a certified nationwide class of active-duty military personnel whose homes were foreclosed in violation of the for Servicemembers Civil Relief Act ("SCRA"). Working together, Bursor & Fisher and Faruqi & Faruqi achieved a nationwide class settlement which has been preliminarily approved by Judge Gardephe, providing each class member with a monetary recovery of at least \$116,785.00.

58. Plaintiffs have dismissed their claims against True Value and Home Depot [Dkt. Nos. 19, 69], and had proposed to dismiss their claims against Lowe's on the same terms as Home Depot. Remarkably, Lowe's, represented by the same counsel as Scotts, refused to be dismissed from the case.

59. In response to a third-party subpoena, Wal-Mart Stores, Inc. produced contact information for 55,531 individuals who purchased Scotts EZ Seed.

60. I declare under penalty of perjury under the laws of the United States and the State of New York that the foregoing is true and correct. Executed on March 31, 2014 at New York, New York.

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/s/

Joseph I. Marchese